Pan American Electric, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 1516, AFL–CIO. Case 26–CA–16721

June 14, 1996

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND FOX

On November 7, 1995 Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order[4] as modified and set forth in full below.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Pan American Electric, Inc., Jonesboro, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their membership in labor organizations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer John Baker full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make John Baker whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Jonesboro, Arkansas, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 6, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a

[1] We deny the Respondent's motion to strike the General Counsel's answering brief. The General Counsel's delay in submitting the brief was due only to the general shutdown of the Federal Government caused by a lack of funding, and not to any fault of the General Counsel. See 60 Fed.Reg. 50648 (1995).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find no merit to the Respondent's allegations of bias and prejudice on the part of the judge. On our full consideration of the record and the decision, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence.

[3] We note that the Supreme Court recently held that job applicants who are also paid union organizers are nevertheless employees within the meaning of Sec. 2(3) of the Act and are, therefore, entitled to its protection. See *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995).

Assuming, arguendo, that some of Respondent's employees were engaged in unprotected activity, we find that the Respondent offered no evidence that discriminatee Baker was involved in any unprotected activity.

[4] We leave to compliance the issue of the effect, if any, of discriminatee Baker's admissions concerning the misrepresentations he made on his employment application on his right to reinstatement and backpay as a remedy for the Respondent's discrimination against him. See *Escada (USA), Inc.*, 304 NLRB 845 at fn. 4 (1991); *John Cuneo, Inc.*, 298 NLRB 856, 857 at fn. 7 (1990).

[5] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees about their own or other employees' union activities or sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer John Baker full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make John Baker whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of John Baker, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

PAN AMERICAN ELECTRIC, INC.

Linda M. Kirchert, Esq., for the General Counsel.
R. Brent Ballow, Esq. and *John J. McCarthy III, Esq. (King & Ballow)*, of Nashville, Tennessee, for the Respondent.

DECISION

STATEMENT OF THE CASE

ALBERT A. METZ, Administrative Law Judge. This case was heard at Jonesboro, Arkansas, on September 6, 1995.[1] International Brotherhood of Electrical Workers, Local Union No. 1516, AFL–CIO (the Union) has charged that Pan American Electric, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The primary issues are whether Respondent violated Section 8(a)(1) of the Act by interrogating employees and violated Section 8(a)(1) and (3) by terminating John Baker. I find that the Respondent did violate the Act by unlawfully interrogating employees and discharging John Baker.[2]

FINDINGS OF FACT

A. *Background*

The events in this case occurred in February and March 1995 at the Respondent's Post Cereal jobsite in Jonesboro, Arkansas. The Respondent, a nonunion employer, had contracted to do work on a large corn cleaning machine and was hiring electricians. Dan Fladebo was the Respondent's superintendent in charge of this project. The Respondent used a trailer as a combination office, employee lunch area, and storage site. Fladebo frequently used the trailer for his work. The trailer was an open area and was estimated to be approximately 8-by-40 feet in dimension.

The Union was interested in organizing the Respondent's work force. As a result some union members applied for work openly demonstrating their union affiliation. Others sought employment with the Respondent but concealed their union membership.[3]

B. *The Respondent Hires Union Members*

John Baker is a union electrician. On February 22 he applied for work at the Respondent's Jonesboro site. He did not disclose his union affiliation to the Respondent. Baker was hired and started on March 1. Shortly after he commenced work, Baker began discussing the Union with fellow employees and giving them union literature.

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[1] All subsequent dates refer to 1995 unless otherwise indicated.

[2] Although the charge alleges unlawful discrimination against seven listed persons and unspecified ''others,'' only Baker is named in the complaint as an alleged discriminatee. (G.C. Exhs. 1(a) and (c).)

[3] The Respondent argues that none of the union employees involved in this case should be considered ''employees'' within the meaning of the Act. The Respondent points to the Union's ''salting'' campaign of infiltrating union members into the Respondent's work force and argues that no legitimate protected purpose is served by such campaigns. I decline the Respondent's invitation to assess the legitimacy of such strategic tactics. It is settled Board law that even if an applicant is a full-time paid union organizer such person is nonetheless an ''employee'' within the meaning of the Act. *Sunland Construction Co.*, 309 NLRB 1224, 1230 (1992); *Town & Country Electric*, 309 NLRB 1250, 1258 (1992). The Supreme Court has granted certiorari on this issue. See *Town & Country Electric v. NLRB*, 34 F.3d 625 (8th Cir. 1994), cert. granted 116 S.Ct. 450 (1995).

Respondent's brief contains a motion to postpone the decision in this case pending the outcome of the Supreme Court's decision in *Town & Country*. As this matter has been heard and the Board law is settled I deny the Respondent's motion to hold the decision in abeyance.

On February 23, W. E. Smith, the Union's assistant business agent, and union member Gary Bunch applied for work with the Respondent. They openly displayed their union sympathies by wearing clothing with union insignia. In addition Smith asked Fladebo to sign a union project agreement. They were told by Fladebo that he had run out of applications and to come back in a few days. They did return on February 27 and were given job applications to fill out. They were not hired immediately.

C. *Interrogation—February 27*

On about February 27 Scott Couturier, a union electrician, went to the Respondent's jobsite and talked with Fladebo about getting hired. Couturier recalled that Fladebo took him to his truck and gave him an application. Couturier testified that Fladebo then asked him if he was in the Union. Couturier said no. Fladebo said, ''Okay'' and told him to go in the trailer and fill out the application.

Fladebo testified that when Couturier asked for an application he gave him one. Fladebo denied he asked Couturier any questions at the time. He specifically denied asking if Couturier was a union member.

Considering the demeanor of the two witnesses to this conversation I credit Couturier's version that the interrogation about his union affiliation did happen. Fladebo's demeanor was not impressive. He appeared to be hedging the truth throughout his testimony. In contrast, Couturier was a forthright witness who did not embellish his testimony and whose demeanor was that of a person attempting to tell accurately what he observed. I find that Fladebo did interrogate this applicant for employment and by so doing the Respondent violated Section 8(a)(1) of the Act as alleged. *Casey Electric*, 313 NLRB 774, 785 (1994).

D. *The First Strike*

On March 9 Smith and Bunch were hired by the Respondent. On March 10 they went to Fladebo and told him they were going on strike to support the Union's Jackson, Mississippi local union. According to Smith the Mississippi local was engaged in an unfair labor practice strike against the Respondent. Smith and Bunch then walked off the job.

E. *The Termination of John Baker*

On March 20 Baker reported to work wearing his customary union T-shirt and small union button on a pencil clip. He also had with him his hardhat that bore a logo of ''Scab Hunter.'' The hat showed a picture of man looking down the barrel of a double barrel shotgun, with the words ''scab'' on one barrel and ''hunter'' on the other. Baker talked to Fladebo about the job and was assigned to work with employee Mike Freeman.

At lunchtime Baker went to the Respondent's trailer and, along with other employees, started eating. Soon Smith and Bunch entered, followed shortly by Fladebo. Smith and Bunch told Fladebo that they were making an unconditional offer to return to work from their strike. Fladebo stated that they had been terminated the day they went on strike. Smith objected and said that the Respondent could not fire them for striking. Fladebo said he would check with the Respondent's office and see what they wanted done.

At this point in the conversation the Union's witnesses state Fladebo turned to Baker and said he was fired also. Baker asked why. Fladebo said he had not been doing enough work. As he was leaving later, Baker told Fladebo he thought his discharge was unlawful and he might file charges with the NLRB. Fladebo gave Baker a separation slip that stated he had been terminated due to a reduction in force.

F. *Analysis of the Baker Discharge*

The General Counsel has the initial burden of establishing a prima facie case. This must be sufficient to support an inference that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support a prima facie showing of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, timing, and employer animus. Once such prima facie unlawful motivation is shown, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. If Respondent goes forward with such evidence, the General Counsel ''is further required to rebut the employer's asserted defense by demonstrating that the [alleged discrimination] would not have taken place in the absence of the employee['s] protected activities.'' *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). ''A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.'' *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. sub nom. 705 F.2d 799 (6th Cir. 1982).

Fladebo denied that he had any knowledge that Baker was a union supporter. Baker testified that he began talking to fellow employees about the Union immediately after he was hired. Many of these conversations took place in the Respondent's trailer when the workers and Fladebo were present during lunchtime. Baker regularly wore union T-shirts at work. He wore his ''Scab Hunter'' hardhat while working. On two occasions Baker brought his lunch kit to work that had union stickers pasted on it. Couturier testified he recalled one conversation in particular between Baker and other employees concerning union wages. The exchange took place in the trailer. He recalled Fladebo turning around from his desk and paying close attention to what was being said.

In light of the openness of Baker's union activities and Fladebo's demeanor, Fladebo is not credited when he denies he knew of Baker's union sympathies. I find that the Respondent had knowledge of Baker's union sympathies and his activities to organize its employees.

As stated above, Fladebo has been found to have interrogated Couturier about his union membership. As discussed below, Respondent engaged in a separate interrogation incident on March 24. I find that these violations are indicative of the Respondent's animus concerning the Union. Addition-

ally, I conclude that Fladebo's initial position that Smith and Bunch were fired for going on strike is a further manifestation of Respondent's animus towards employees' union activities.

Against the background of Respondent's knowledge and animus the context and suddenness of Baker's discharge are striking. All witnesses, save Fladebo, state that Baker was fired precipitously after Fladebo told the strikers they had been fired. This version of events is credited. Considering Fladebo's demeanor and the weight of the evidence, he is not credited in his assertion that he fired Baker and then talked to the strikers.

Fladebo's demeanor and his asserted reason for firing Baker were not persuasive. Fladebo was relatively vague as to his complaints about Baker's work. He admitted that he had never counseled or warned Baker that his work was deficient. Fladebo never told Baker to work faster. He did not dispute that he had complimented Baker for his work. Fladebo conceded that Baker was working with two inexperienced helpers and that any slowness in production could be attributed to this fact. In his 5 years working for the Respondent, Fladebo has never fired any employee except Baker. The timing of the termination came in the heat of the confrontation with strikers Smith and Bunch and in front of the rest of the work force. Fladebo listed the reason for the discharge as a reduction in force on Baker's termination slip—not the asserted lack of production.

In sum, I do not credit Fladebo's testimony and I find that the reason he stated for discharging Baker was a pretext. I infer that because of the false reason advanced for the termination that there was another motive that the Respondent wished to conceal. I conclude that reason was Baker's support for the Union. *Shattuck Denn Mining v. NLRB*, 362 F.2d 466 (9th Cir. 1966). I find that such a discriminatory termination violates Section 8(a)(1) and (3) of the Act.

G. *The Second Strike and March 24 Interrogation*

On March 22 Smith and Bunch were rehired by the Respondent after Fladebo sought them out at a local restaurant. When they returned to the job they received hearsay reports that employee John Maddox had been interrogated by Fladebo about which employees belonged to the Union. As a result, on March 24, Smith, John Maddox, Karen Maddox, Couturier, and Freeman decided to strike. The strike was in protest of the alleged interrogations of J. Maddox and because they were not being paid higher wages and expenses that they had learned out of state employees were to receive.

The workers went to Fladebo and told him of their strike plans. According to the Union's witnesses, Smith, Karen Maddox, and Couturier, they were asked by Fladebo if there were any more union electricians on the job. According to Couturier, John Maddox replied, ''[T]here were a couple.'' Fladebo did not specifically testify concerning this meeting. He did deny that he had ever asked John Maddox if he or anyone else was in the Union.

The three Government witnesses that testified concerning this alleged interrogation were believable. Their demeanors were those of persons accurately telling what they remembered of the event. As discussed above, Fladebo's demeanor was not impressive. He did not specifically testify about what happened at this meeting and his general denial is not credited. I find that Fladebo did interrogate the employees as alleged on March 24. The context of this interrogation was employees going on strike being asked about the identity of other employees who were union members. In light of the past unlawful interrogation of Couturier and the telling of Smith and Bunch that they were discharged because they had been on strike, I find that the circumstances of the question imply a threat. I find that under all of the circumstances this interrogation violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Pan American Electric, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. International Brotherhood of Electrical Workers, Local Union No. 1516, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union membership or sympathies.
4. Respondent violated Section 8(a)(1) and (3) of the Act by discharging John Baker on March 20, 1995, because of his union activities.
5. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
6. Respondent has not violated the Act except as herein specified.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged John Baker it must offer him reinstatement to his former position, without prejudice to his seniority or other rights and privileges. If any such position does not exist, he must be offered reinstatement to a substantially equivalent position, dismissing if necessary any employee hired to fill the position. The Respondent must make him whole for any loss of earnings and other benefits he may have suffered, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). All reinstatement and backpay recommendations are subject to the procedures discussed in *Dean General Contractors*, 285 NLRB 573 (1987), and *Haberman Construction Co.*, 236 NLRB 79 (1978).

Respondent shall remove from its records all references to the unlawful discharge of John Baker and notify him in writing that this has been done, and that this discriminatory action will not be used against him in any way. *Sterling Sugars*, 261 NLRB 472 (1982).

[Recommended Order omitted from publication.]